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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOAN R. KAREL

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the government present constitutionally sufficient evidence to convict Ms. Karel of 13 counts of mail fraud?

2. Did the trial court commit plain error when it ignored the mens rea element of the mail fraud statute and found Ms. Karel to be strictly liable for any information on a form which bears her signature?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the conviction of Ms. Karel is attached in the Appendix at page A-2.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming Ms. Karel's conviction was entered on June 7, 1994.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person...shall be deprived of life, liberty, or property without due process of law...

STATEMENT OF THE CASE

On April 21, 1992, Joan R. Karel was indicted on 13 counts of mail fraud in violation of Title 18 U.S.C. § 1341. The

initial appearance was made in the United States District Court for the Southern District of Florida. (R.1). On July 15, 1992 the case was removed from the Southern District of Florida to the Eastern District of Wisconsin. (R.4). On July 19, 1992, arraignment was postponed until the date of the trial. (R.12). On December 16, 1992, Ms. Karel was arraigned and entered pleas of not guilty. A jury waiver was entered and a two-day bench trial commenced on the same date.

On April 27, 1993, the court entered an order finding Ms. Karel guilty of all 13 counts of mail fraud. A Notice of Appeal was filed on behalf of Ms. Karel on September 20, 1993. On June 7, 1994, the Seventh Circuit Court of Appeals denied Ms. Karel's appeal and affirmed all 13 of her convictions.

STATEMENT OF THE FACTS

Many of the facts of the present case were undisputed. Prior to trial, a stipulation as to the facts was reached between the government and defense counsel, which stipulation is set forth below.

1. On or about June 8, 1984, temporary maintenance orders were issued in the divorce of Joan R. Karel and Norman Karel. Norman Karel was ordered to pay Joan R. Karel $2,000.00 a month support. In addition, Norman Karel was ordered to pay the following expenses:

Mortgage Payment
Real Estate Taxes
Residential Insurance
Life Insurance
Gasoline
Health Insurance
Automobile Insurance
Doctor Bills
Condominium Assessments
Condominium Automobile Parking Fees

2. On or about April 3, 1986, the divorce of Norman and Joan R. Karel was entered by the Cook County Clerk of Circuit Court in Illinois. The terms of the divorce decree include that Norman Karel agreed to pay Joan R. Karel $3,250.00 on April 15, 1986 and $6,500.00 on May 15, 1986, for a total maintenance payment of $9,750.00. Joan R. Karel waived any right to receive any maintenance or other spousal support from Norman Karel and her right to receive any such support was forever barred by the divorce decree. Additionally, Joan R. Karel received a 22.22 percent interest in the limited partnership known as Milwaukee Road House Bar and Grill. Norman Karel received the entire interest held by Joan R. Karel and Norman Karel in a condominium apartment located in Scottsdale, Arizona. Ms. Karel retained

ownership on her race horse, Dynamite Joanie, and her foal.

3. On or about August 5, 1986, Joan R. Karel applied for a disability income insurance policy from Northwestern Mutual Life Insurance Company (hereinafter "NML"). Joan R. Karel paid a $76.00 premium payment to her NML insurance agent, William Schilling.

4. On or about August 7, 1986, William Schilling, Insurance Agent for Joan R. Karel, forwarded application forms in the name of Joan R. Karel to the Milwaukee, Wisconsin office of NML for completion of routine underwriting.

5. On or about August 7, 1986, the disability income insurance policy issued by NML for Joan R. Karel became effective.

6. On or about August 18, 1986, Joan R. Karel suffered a disability.

7. On or about August 29, 1986, NML interviewer, Kathy Rehl, conducted a telephone interview with Joan R. Karel to verify items on the disability insurance application.

8. On or about September 5, 1986, NML sent a computer message (known as a "link") to William O. Schilling III, indicating that Joan R. Karel had disclosed that part of the stated income on the application contacted amounts of unearned income including "alimony" and money from other sources. This disclosure was during the "PHI" (personal history interview). The link requested that Schilling submit IRS forms "to clarify this situation". A DI Application Work Sheet was completed by NML personnel reflecting this material.

9. On or about October 21, 1986, Joan R. Karel's 1985 tax form W-2's which

listed her income as $111,606.00 were received at NML in Milwaukee, Wisconsin.

10. On or about October 27, 1986, the disability income policy for Joan R. Karel was sent by United States mail from NML in Milwaukee, Wisconsin to William Schilling.

11. On or about February 11, 1987, NML's office in Milwaukee, Wisconsin received a telephone call from William Schilling's assistant Donna Cozzi-Palmer stating that Karel had been disabled since August 18, 1986.

12. On or about February 11, 1987, a claim for disability benefits was filed with NML in the name of Joan R. Karel.

13. On or about February 24, 1987, NML sends a letter to Joan R. Karel confirming notification of her disability and defining earned income as "the sum total of salary, wages, commissions,

fees, bonuses or other compensation earned by you from all sources of work performed by you less normal and customary business expenses."

14. On or about April 30, 1987, a request for disability benefits on behalf of Joan R. Karel is submitted and the 1985 earned income for Joan R. Karel is listed as $111,606.00.

15. On or about July 1, 1987, a complaint was filed on behalf of Joan R. Karel with the State of Illinois Department of Insurance in reference to the delay in the processing of her claim. The State of Illinois Department of Insurance File Number is 87-5925.

16. On or about July 8, 1987, NML wrote a letter to the State of Illinois Department of Insurance responding to the complaint made by Joan R. Karel. In that letter, NML indicates that the NML agency

office was aware of Joan Karel's disability "as early as December 1986. On February 11, 1987 the home office was verbally notified by them of the disability...". The letter also states "Additionally, I telephoned the Servicing Agent, William Schilling on July 7, 1987 to review with him the procedure for notifying the home office of claimant's disability in a timely manner."

17. On or about July 23, 1987, NML mails a benefit check to Joan R. Karel's attorney for the period of October 17, 1986 through April 17, 1987, totalling $15,654.61.

18. On or about October 20, 1987, a disability payment is mailed by NML to Joan R. Karel in the amount of $15,078.84.

19. On or about October 20, 1987, NML mails a letter to Joan R. Karel

advising her that based on inflation her pre-disability earned income has been raised to $9,654.50 monthly.

20. On or about December 9, 1987, NML mails a disability payment in the amount of $5,793.84 to Joan R. Karel.

21. On or about December 14, 1987, NML reimburses Joan R. Karel for FICA previously deducted from disability income benefits.

22. On or about January 26, 1988, NML mails a disability payment in the amount of $3,120.00 to Joan R. Karel.

23. On or about February 9, 1988, NML mails a disability payment in the amount of $3,120.00 to Joan R. Karel.

24. On or about mid-February, 1988, NML requested that Ms. Karel provide additional tax forms to verify her income.

25. On or about March 28, 1988, NML mails a disability payment in the amount of $8,000.00 to Joan R. Karel.

26. On or about April 28, 1988, NML mails a disability payment in the amount of $4,000.00 to Joan R. Karel.

27. On or about May 24, 1988, NML sends a letter to Joan R. Karel requesting tax information.

28. On or about June 13, 1988, NML mails a disability payment in the amount of $8,000.00 to Joan R. Karel.

29. On or about June 14, 1988, William Schilling's office sends NML the 1987 tax forms of Joan R. Karel, including a W-2 and an 1120.

30. On or about September 12, 1988, NML mails a letter to Joan R. Karel requesting further tax information.

31. On or about September 28, 1988, NML mails a disability payment in the amount of $4,000.00 to Joan R. Karel.

32. On or about September 28, 1988, NML provides an accommodation payment to Joan R. Karel of $4,000.00.

33. On or about September 30, 1988, NML mails Joan R. Karel a letter summarizing a September 27, 1988 phone call and requesting a 1985 Form 1120.

34. On or about October 27, 1988, NML mails a disability payment in the amount of $12,000.00 to Joan R. Karel.

35. On or about November 1, 1988, NML mails a letter to Joan R. Karel requesting tax returns.

36. On or about November 17, 1988, NML mails a disability payment in the amount of $4,000.00 to Joan R. Karel.

37. On or about December 16, 1988, NML mails a disability payment in the amount of $4,000.00 to Joan R. Karel.

38. On or about January 19, 1990, William Schilling sends a 1985 tax form 1120 to NML's Milwaukee office. The 1985 tax form shows compensation to officers with Joan R. Karel identified as the sole officer and 100 percent owner in the year 1985 in the amount of $6,500.00.

39. On or about January 20, 1989, NML mails a disability payment in the amount of $4,000.00 to Joan R. Karel.

40. On or about February 8, 1989, NML sends a letter to Joan R. Karel detailing tax form discrepancies with the various tax forms previously submitted.

41. On or about May 13, 1989, attorney for Joan R. Karel, Michael Freeman, sent an accurate copy of Joan R.

Karel's 1985 1040 which lists Ms. Karel's earned income as $11,600.00.

42. On or about June 29, 1989, NML received a letter from William O. Schilling, III wherein he responds to questions posed by answering about typewriter similarity between the request for disability benefits form of April 30, 1987 and a letter generated in his office on April 8, 1987. In the letter, Schilling says "there was know (sic) way she could have altered the figures simply because she didn't know I was asking for them."

43. On or about July 13, 1989, NML sent a computer "link" to William O. Schilling, III wherein they asked details about the original application including where the application interview took place and the source of income amounts indicated on the application.

44. On July 17, 1989, NML sends a letter to Joan R. Karel explaining that there were material differences between her forms W-2 and 1040 that were submitted during the application process and those submitted in January 1989.

45. On July 17, 1989, NML sent a check in the amount of $70.94 to Joan R. Karel, the negotiation of which would constitute "agreement to rescind the policy and terminate your claims thereunder", per the letter dated July 17, 1989.

46. On or about July 19, 1989, NML received a letter from William o. Schilling, III, entitled "The Taking of the Application" wherein he responds to questions posed in a computer link of "07/13/89" inquiring about the details of the taking of the application. Schilling includes noting that income records were

produced in his presence and "I don't see how anyone could have tampered with them considering I watched Joan produce the records in front of me."

47. On or about August 1, 1989, NML filed a civil complaint in United States District Court for the Northern District of Illinois, Eastern Division. NML was plaintiff and Joan Karel was defendant. The case number is 89-C-5881. The subject of the civil complaint is the same as the subject of the criminal complaint that is the subject of the instant case.

48. On or about August 9, 1991, the State of Illinois Department of Insurance issued an Order of Revocation revoking the license of William O. Schilling III because of complaints received from NML insured Ralph K. Epifanio.

49. The typing on the originally submitted form W-2 in the name of Joan R. Karel is not discernibly different from the typing on documents generated on a typewriter within the office of William O. Schilling, III.

REASONS FOR GRANTING THE WRIT

I. MS. KAREL'S CONVICTIONS WERE BASED UPON INSUFFICIENT EVIDENCE AND, THEREFORE, VIOLATE THE DUE PROCESS CLAUSE.

"[T]he due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime(s) with which he is charged." *In Re. Winship, 397 U.S. 358, 364 (1970); Jackson v. Virginia, 443 U.S. 307, 309, 313-14 (1979).* In determining whether the government has proven every element of the crime, in general, "[t]he relevant question is whether, after reviewing the

evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id. at 319*.

Thus, to evaluate the sufficiency of the evidence supporting Karel's convictions, this court must consider: A) the allegations in the indictment; B) the elements of each of those allegations; and C) the facts introduced as proof of the elements of those allegations.

A. The Government Failed To Prove Ms. Karel Guilty Of Knowingly And Intentionally Misrepresenting Her Income To NML.

1. Terms Of The Indictment.

Ms. Karel was charged with 13 counts of intending to devise a scheme to defraud and to obtain money by means of false and fraudulent pretenses and

representations. Specifically the government contended that Karel intentionally misrepresented her income so as to qualify for a higher disability insurance benefit. As a result, it was alleged that Karel caused to be delivered by mail 13 disability benefit checks from Northwest Mutual Life (NML), for which she would otherwise have been ineligible.

2. Elements Of The Allegation.

The government must prove each of the following elements beyond a reasonable doubt:

A) that Karel knowingly devised a scheme to defraud and obtain money by means of false pretenses and representations;

B) for the purpose of carrying out this scheme, Karel used the United States mail; and

C) Karel did so knowingly and with intent to defraud. Title 18, U.S.C. § 1341.

Mail fraud is a specific intent crime for which the government was required to prove beyond a reasonable doubt that Karel intended to defraud NML. *United States v. Martin-Trigona, 684 F.2d 485, 492 (7th Cir. 1982).* Mere knowledge of shadowy dealings is not enough to establish the requisite specific intent. *United States v. Bailey, 859 F.2d 1265, 1274 (7th Cir.) Cert. Denied, 488 U.S. 1010, 109 S.Ct. 796 (1988).* Thus, the absence of an intent to defraud, is a complete defense to the charge of mail fraud. *Martin-Trigona, 684 F.2d at 492.*

The government could not merely establish that Karel participated in a transaction that turned out to be part of a fraudulent scheme. It had to prove

Karel's "willful participation in [the] scheme with knowledge of its fraudulent nature and with intent that these illicit objectives be achieved." *Bailey, 859 F.2d at 1273, (citations omitted).*

3. Facts Introduced At Trial.

At trial, the only contested issue was whether Karel knowingly and intentionally misrepresented her income to NML with the intent to defraud.

The government, however, could not present any direct or circumstantial evidence which established that Karel had the specific intent to defraud NML or that she intentionally misrepresented her income to NML when she applied for disability insurance.

It was stipulated that on or about August 5, 1986, Karel, through her NML agent, William Schilling, applied for a disability income insurance policy from

NML. In addition, on or about August 7, 1986 Schilling forwarded the application forms in Karel's name to the Milwaukee, Wisconsin office of NML. Also on this date the disability income insurance policy issued by NML for Karel became effective.

Just 20 days after this policy became effective, Karel was interviewed by Kathleen Rehl, a Personal History Interviewer for NML. The purpose of this interview was to gather information from Karel, including information regarding her income. During the course of this interview, Karel told Rehl that her <u>total</u> income range between $110,000.00 and $115,000.00. Karel stated that included in this figure was $39,000.00 from alimony, income from two race horses, income from investments in a restaurant and rental income from a townhouse in

which Karel had 25 percent ownership. (Tr. 127-133). Therefore, as early as three weeks after the application was signed by Karel, she personally advised NML that the income figure of $110,000.00 to $115,000.00 set forth in her disability insurance application included both earned and unearned income (as those terms were defined by NML). Clearly, Karel was not attempting to misrepresent her income or its sources during this interview.

As a result of this interview, NML sent a computer message to Schilling, indicating that Karel had stated that part of her income on the application contained amounts of unearned income including "alimony and money from other sources". Because of this disclosure, NML requested that Schilling submit IRS forms to clarify the situation.

On October 21, 1986 Schilling forwarded to NML a W-2 form which he purported to be Karel's 1985 W-2 form. This document listed her income as $111,606.00. At trial, an issue arose over who authored this W-2 form.

Ms. Donna Cozzi-Palmer, Schilling's assistant, testified that when NML requested Karel's 1985 W-2 form, the circumstances surrounding the submission of that form were "strange". In essence, Cozzi-Palmer's testimony was that she saw Schilling hold up Karel's W-2 form, point to the area of that form which contained the figure for earned income, and stated "...this won't fly". She then stated that she saw him use whiteout to cover a portion of the W-2 form. He then handed her what she believed to be the same W-2 form with instructions to forward it to NML. The earned income figure on the W-2

form which Schilling gave to Cozzi-Palmer was $111,606.00. (Tr. 226-227).

Cozzi-Palmer also testified that she was the one who filled in the amount of income on the disability application form after she received it from Schilling. She testified that she had received an application from Schilling which was blank except for Karel's signature. (Tr. 221-223). Therefore, it was established at trial that Karel had signed a blank application form with no knowledge of what income was eventually written on the form.

Cozzi-Palmer further testified that she prepared the request for disability benefits form for Karel and that she obtained the information to complete the form from the file located in Schilling's office. (Tr. 230). She then brought the document to Karel for her signature.

Karel signed the document, however, she never read it. (Tr. 230). Clearly, Karel had no idea what income was stated on that form. Thus, there was no evidence of her intent to defraud NML or evidence that she misrepresented her income.

Cozzi-Palmer also testified that she personally observed Schilling altering documents on prior occasions. (Tr. 234-235). Specifically, she recalled viewing a document in which Schilling had altered the date the application was to become effective. Originally, the application stated it was to become effective on the first of the month. However, Schilling altered the document to make it effective on the 31st. Cozzi-Palmer believed that Schilling had "floated" the premium payment he received with the application for one month. (Tr. 235).

Cozzi-Palmer also testified that in her opinion Karel did not understand the policy she was signing. She based this conclusion on the questions Karel asked her about the policy. She testified that Karel did not understand the benefits and that she had to "do a lot of hand holding" with her. Cozzi-Palmer also stated that she never remembered having to hold anybody's hand as much and walk them through the process so much as with Karel. (Tr. 240).

Cozzi-Palmer was the only individual to testify who had any direct knowledge of the transactions between Schilling and Karel. Her testimony established that Schilling altered Karel's 1985 W-2 form without Karel's knowledge. It further established that Karel signed a blank application form and that the income was later filled in by Cozzi-Palmer. Her

testimony also established that Karel did not read the disability benefits form before she signed it.

It was also undisputed that three weeks after the policy became effective, on August 29, 1986, Karel personally told the NML representative that her total income included alimony, income from race horses and income from rental property and a restaurant. This was clearly unearned income as defined by the policy and is proof that Karel had no knowledge of the fraud Schilling was attempting to perpetrate. If Karel had intended to defraud NML, certainly she would not have disclosed this information three weeks after the application was signed.

At trial the government failed to produce even one witness who could testify that Karel had knowingly and intentionally misrepresented her income.

Nor was the government able to present any witness who had any personal or direct knowledge of the transaction between Schilling and Karel. The government also failed to produce any circumstantial evidence to establish beyond a reasonable doubt that Karel knowingly intended to defraud NML.

The government's evidence consisted primarily of documents generated as a result of Karel's application for disability insurance. In essence, the government's theory of the case was that because Karel signed an application and related documents for disability insurance benefits which documents contained inaccurate information regarding her "earned" income, she therefore knowingly misrepresented her income and intended to defraud NML. Clearly this falls far short of

establishing the specific intent required to sustain a mail fraud conviction.

The government's main witness, Jean Maier, testified primarily for the purpose of identifying records kept by NML as a result of Karel's application. Maier had no personal knowledge of the transaction between Schilling and Karel. Maier had no knowledge as to who filled out the application form or who filled in the amount of $111,606.00 on the 1985 W-2 form submitted with the disability application. Maier could not even testify whether it was Karel's signature on the application. Therefore, her testimony does not support the government's position that Karel intentionally and knowingly misrepresented her income to NML.

The government also presented the testimony of Kathleen Rehl. As indicated

above, Rehl testified that she conducted a personal history interview with Karel and that during the course of this interview, Karel stated that her total income ranged between $110,000.00 and $115,000.00. Rehl further testified that Karel stated that this amount included alimony, rental income, income from race horses and a restaurant. Clearly, her testimony supports Karel's position that she did not knowingly intend to defraud NML. It was only after Karel provided this information to NML that NML requested Karel's 1985 W-2 form. That request was made to Schilling and an overwhelming inference can be drawn that Schilling altered Karel's W-2 form without Karel's knowledge.

The defense presented the testimony of Michael Sykes. Sykes was an investigator in the defense counsel's

office who had presented the documents to a questioned documents examiner. The documents examiner compared a letter generated from Schilling's office to Karel, with the W-2 form submitted by Schilling to NML. The document examiner concluded that there was not discernable difference between the typewriters used on both the letter and the W-2 form. (Tr. 213-215).

In a very similar case of the case at bar, the Seventh Circuit overturned the conviction of an accused because the government failed to present any direct or circumstantial evidence that the accused had intended to defraud anyone. *Bailey, 859 F.2d at 1274-75.* In Bailey the accused had been caught in the middle of a scheme to defraud loan organizations. The government argued that the accused had purposely chosen not

to discern whether the transaction was illegal. As evidence of the accused suspicions that the transaction was illegal, the government presented testimony of the accused "raised eyebrows" upon hearing of the transaction. *Id. at 1275*. Needless to say, the court found evidence of raised eyebrows to be insufficient to establish the intent of the accused intent to commit fraud. *Id*.

As in *Bailey*, the government has failed to present any direct or circumstantial evidence that Karel intended to defraud NML. Rather, all the evidence presented established that Karel was caught in the middle of Schilling's scheme to defraud NML. Unlike *Bailey*, the government cannot even point to any "raised eyebrows" by Karel. It was clearly established that Karel did

not understand the policy and had to have her "hand held" throughout the entire process. It was also established that Karel had no knowledge of the amount of income represented to NML on her behalf by Schilling. Clearly, the government has failed to meet its burden of proof and, as in *Bailey*, this court should overturn Karel's convictions as volative of her constitutional guarantee of due process.

II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT IGNORED THE MENS REA ELEMENT OF THE MAIL FRAUD STATUTE AND HELD MS. KAREL TO A STRICT LIABILITY STANDARD.

Title 18 U.S.C. § 1341, requires that the trier of fact determine that the accused "[intended] to devise" a scheme to defraud by false pretenses. However, the trial court merely found that Karel should have known what information had been submitted on her behalf to NML.

Because the trial court failed to employ the correct mens rea standard, it committed plain error which requires this Court to reverse Karel's convictions.

Even a cursory examination of the trial court's opinion reveals that its erroneous reliance on the three factors listed below was plain error. The trial court's ruling relies exclusively on:

1. The personal history interview with Rehl;
2. The request for disability benefits form; and
3. The assumption that Karel was "experienced in business". (R.30).

Based on these three, the trial court erroneously concluded that Karel should have known what income had been represented to NML on her behalf.

The trial court's decision essentially holds Karel strictly liable for any information on a form which bears her signature. This clearly is not the specific intent required for a conviction under the mail fraud statute. As a result, the trial court committed plain error and Karel's convictions should be overturned.

Plain error occurs when an error likely to have changed the outcome of the trial has occurred. *United States v. Wolf, 787 F.2d 1094, 1098 (7th Cir. 1986)*. When plain error occurs, a reversal is necessary to prevent a miscarriage of justice. *United States v. Sherwood, 770 F.2d 650, 652-53 (7th Cir. 1985)*.

A. The Personal History Interview With Rehl.

A miscarriage of justice occurred when the trial court misinterpreted Rehl's testimony. It is clear from her testimony that when she asked Karel what her income was, Karel did not limit her response to her earned income, but rather, provided Rehl with her total income. Rehl testified that Karel informed her that the $110,000.00 figure was her total income and that this figure included $39,000.00 of alimony, income from a race horse, and income from a restaurant and rental property. The Stipulation of Facts, paragraphs 1 and 2, established the nature and extent of Karel's total income.

This testimony clearly established that Karel did not intend to misrepresent her income to NML and in fact did not

misrepresent her income to NML. It is incomprehensible to believe that one who was intending to claim $110,000.00 as her earned income would then state that that figure included alimony, income from race horses, income from rental property and income from a restaurant. Clearly by revealing all the sources of her income, Karel was informing NML of her total income and never stated that she earned $110,000.00. As a result, the trial court committed plain error when it found that based on this interview, Karel had intentionally misrepresented her income. Therefore, Karel's convictions should be reversed.

B. The Request For Disability Benefits Form.

A miscarriage of justice also occurred when the trial court erroneously relied on government exhibit 12, the

Request for Disability Benefits form, to convict Karel. The court believed that this document proved that Karel knew what earned income had been represented to NML on her behalf because her signature appeared on the document.

However, a close examination of this document reveals that the instructions indicating where to put the earned income figure is in a type face no larger than one sixteenth of an inch. Moreover, the testimony of Cozzi-Palmer established that Karel signed the document without reading it, making it virtually impossible for Karel to have seen the figure attributed to her as her earned income. Simply because Karel's signature appears on the same form as one which states her monthly income as $11,179.00 does not prove that she saw that figure

or that she intentionally misrepresented her income to NML, especially in light of Cozzi-Palmer's uncontroverted testimony that Karel did not look at the document before she signed it.

The trial court however, found it irrelevant whether Karel actually saw this figure or not and ruled "Ms. Cozzi-Palmer said Ms. Karel signed it without looking at it; nevertheless, she signed it." (R.30, p. 4; App. VIII). This statement from the trial court demonstrates that it ignored the evidence which established that Karel did not know what income had been represented to NML on her behalf. The court found Karel guilty of 13 counts of mail fraud regardless of whether she had the required mens rea to defraud NML, and thus committed plain error.

A miscarriage of justice occurred when the trial court erroneously relied on the telephone conversation between Karel and Barbara Schwigel. Schwigel conducted a medical history interview with Karel and limited her interview solely to obtaining medical information from Karel. Schwigel did not discuss with Karel any financial information or questioned Karel about her earned income.

Karel did however ask Schwigel about NML's procedure for processing her disability claim. From this simple question, the trial court concluded that Karel was an "active participant in requesting benefits..." and therefore had intentionally misrepresented her income. (R. 30, p. 5; App. VIII). In reality, this conversation says nothing about whether Karel intentionally misrepresented her income to NML but

rather, it indicates that Karel did not understand the insurance industry and its complicated procedures. Therefore, this conversation does not prove that Karel intentionally misrepresented her income to NML and the trial court committed plain error when it relied on it.

C. The Assumption That Ms. Karel Was Experienced In Business.

The trial court clearly held Karel to a strict liability standard when it ruled "[Cozzi-Palmer] took the form to Ms. Karel's office where Karel signed it. Ms. Cozzi-Palmer said Karel signed it without looking at it. Nevertheless, she signed it." (R. 30, p. 4; App. IX). This statement indicates that the trial court did not care whether Karel saw the monthly income figure on the document or not. In its opinion, Karel was liable for merely signing the document.

Therefore the trial court committed plain error and Karel's convictions should be overturned.

With absolutely no evidence from which to form its opinion, the trial court found that Karel "is experienced in business" and was therefore "accountable for documents submitted to an insurance company over her signature." (R. 30, p. 5; App. IX). At trial it was established only that Karel acted as president of a small business; no evidence was presented as to how well that company was doing, how successful Karel was as a business person, what her business education, experience or training had been, or what her specific duties and responsibilities were within this company.

In *Bailey*, the Seventh Circuit rejected the government's contention that because the accused owned a small

business and was involved in local politics that he should have known what he was getting into. *Bailey, 859 F.2d at 1274-75*. The court held that "to infer any special knowledge from this requires too great a leap; the government offered very little detail about Bailey's and Lange's business and political experience, and not all small businessmen and politicians are familiar enough with real estate financing to suspect an illegal or fraudulent transaction." *Id. at 1275*.

Similarly in this case, the government presented no evidence of Ms. Karel's experience or expertise in the business world, nor of her knowledge of the practice and procedure of the disability insurance industry. To the contrary, Cozzi-Palmer testified that Karel clearly did not on understand this

particular disability insurance policy. Cozzi-Palmer further testified that Karel had to have her hand held throughout the entire process. It would take a giant leap of faith to infer that because Karel was president of a small business she was therefore "experienced in business" and/or was familiar with the disability insurance industry and its policies. Therefore, when the trial court relied that Karel's experience in business as a basis for its finding that Karel intended to defraud NML, it committed plain error. Because of this error a miscarriage of justice has occurred and Karel's convictions must be overturned.

CONCLUSION

The government failed to present either any direct or circumstantial evidence which established beyond a

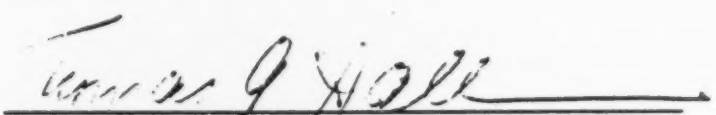
reasonable doubt that Karel intentionally misrepresented her income to NML with the intent to defraud. As a result, her convictions violate the Due Process Clause of the United States Constitution and those convictions should be overturned. In addition, the trial court committed plain error when it ignored the mens rea requirement of the mail fraud statute and held Karel strictly liable for the information contained on the insurance application and related forms. The court also committed plain error when it relied on Karel's "business experience" as a basis for its apparent conclusion that Karel knowingly misrepresented her income on her disability insurance application form with the intent to defraud NML. As a

result, Karel's convictions should be overturned.

Dated at Madison, Wisconsin this 1st day of August, 1994.

Respectfully submitted:

Joan R. Karel, Petitioner
By:
FOX & FOX, S.C.



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APPENDIX

APPENDIX

Trial Court Decision A-1

Court of Appeals Decision A-2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

Plaintiff,

-vs- Case No: 92-CR-91

JOAN R. KAREL

Defendant.

ORDER

On April 21, 1992, Joan R. Karel was indicted on 13 counts of mail fraud, in violation of 18 U.S.C. § 1341. A trial to the court was held on December 16 and 17, 1992. The case was very well presented by Lisa Haybeck for the government and Thomas Cazel and Thomas Halloran for the defense. My decision follows.

Many of the facts of the case are undisputed. A stipulation reached by the parties is incorporated by reference into

this decision. Among other things, it is undisputed that on August 5, 1986, Joan Karel, who was living in Illinois, applied to Northwestern Mutual Life Insurance Company (NML) for a disability income insurance policy. She paid a $76.00 premium payment to her NML insurance agent, William Schilling. On August 7, 1986, Mr. Schilling forwarded the application to the Milwaukee office of NML for underwriting. The policy became effective on August 7, 1986.

It is undisputed that 11 days later, On August 18, 1986 Ms. Karel suffered a disability. Also, after the onset of her disability, the verification of items on the insurance application continued. On September 5, 1986, NML sent a computer message to Mr. Schilling, indicating that Ms. Karel had listed items of unearned income, including alimony, on her

application. On October 21, 1986, Ms. Karel's 1985 tax form W-2 was received by NML; it showed income of $111,606. On October 27, 1986, the disability income policy was sent from NML in Milwaukee to Mr. Schilling. On February 11, 1987, Donna Cozzi-Palmer, Mr. Schilling's assistant, called NML stating that Ms. Karel had been disabled since August 18, 1986. A claim was filed with NML the same day. Another request for disability benefits was submitted on April 30, 1987.

It is also undisputed that on July 1, 1987, Joan Karel complained to the State of Illinois Department of Insurance about the delay in processing her claim. NML responded to the complaint and on July 23, 1987, mailed a benefit check in the amount of $15,654.61 to Ms. Karel's attorney, for the period of October 17, 1986 through April 17, 1987. On October

20, 1987, a payment of $15,078.84 was sent to Ms. Karel. Other disability payments were mailed to Ms. Karel into 1989. In addition, NML made repeated requests for verification of Ms. Karel's income. Finally, on May 12, 1989, Ms. Karel's attorney, Michael Freeman, sent NML an accurate copy of Ms. Karel's 1985 tax form 1040, which listed her true income as $11,600.00, rather than $111,600.00.

The problem with what Ms. Karel did is that she obtained a policy which she did not qualify for. NML would not have issued a disability income policy, paying $4,000.00 monthly, to an applicant who had earned income of only $11,600.00 per year--even if that person were to pay the premiums on the policy. Presumably, if Ms. Karel had not become disabled and had continued to pay the premiums, she would

still have been defrauding NML because NML would not issue such a large disability policy--or perhaps any policy--to a person with her income.

In order to establish a mail fraud charge the government must prove beyond a reasonable doubt the following elements:

(1) that the defendant knowingly devised the scheme to defraud and obtained money by means of false pretenses and representations as described in the indictment;

(2) that for the purpose of carrying out the scheme, the defendant used the United States mail; and

(3) that the defendant did so knowingly and with intent to defraud.

In this case the only contested issue is whether Ms. Karel knowingly and intentionally misrepresented her income to NML. If she did, she used the mails to commit a fraud.

Ms. Karel contends that this is, at best, a civil case. But assuming a criminal fraud occurred, there are only three possibilities; Mr. Schilling, acting alone, committed the fraud; Ms. Karel, acting alone, committed the fraud; or Schilling and Karel did it together.

If the government has proved that Joan Karel intentionally misrepresented her income to NML, it is irrelevant whether William Schilling helped her or not. I believe that the government has proved, beyond a reasonable doubt, the case against Ms. Karel.

Several circumstances support a finding that she intentionally misrepresented her income. The testimony of Kathy Rehl, a personal history interviewer for NML, is persuasive. On August 29, 1986, Ms. Rehl conducted a telephone interview with Ms. Karel to

verify items on the insurance application. NML interviewers write down exactly what the client says during personal history interviews. Exhibit 3, the personal history interview form prepared by Ms. Rehl, shows that Ms. Karel stated that her income was between $110,000.00 and $115,000.00, and that this figure included alimony of $39,000.00. Exhibit 3 also shows information regarding the ownership of two horses, of an investment in a restaurant, and a 25 percent ownership in a townhouse. This information came directly from Ms. Karel.

Exhibit 12 is a Request for Disability Benefits form. Defense witness Donna Cozzi-Palmer, a former assistant to agent Schilling, testified that she prepared the form and obtained the information regarding Ms. Karel's

salary from the agency file. She took the form to Ms. Karel's office where Karel signed it. Ms. Cozzi-Palmer said Ms. Karel signed it without looking at it; nevertheless, she signed. In fact, her monthly income listed as $11,179, is on the form directly above her signature.

In addition, Ms. Karel called NML and talked with Barbara Schwigel to see whether the company had received a request for disability benefits. When she found out the company had not received a request, Ms. Karel told Ms. Schwigel that she would forward a duplicate of the form. On May 1, 1987, Ms. Karel called NML to say that she sent the document via overnight mail. Ms. Karel is an active participant in requesting benefits and was in control of documents on which the false income statements were made.

Adding to the circumstances which convince me that Ms. Karel intentionally misrepresented her income is the fact that she is experienced in business. She was the president and 100 percent sole owner of a business, Evergreen, Inc. One can conclude, I believe, that such a person would know her annual income and is accountable for documents submitted to an insurance company over her signature.

Looking at all the circumstances in this case, I must conclude that Ms. Karel intentionally misrepresented her income to NML and that she used the mails to perpetrate the fraud. The 13 mailings alleged in the indictment were a result of the fraud. I find Ms. Karel guilty. A presentence investigation is ordered. My clerk, Ms. Reggie Torcivia, will call

counsel and arrange a mutually convenient date for sentencing.

SO ORDERED at Milwaukee, Wisconsin, this 27th day of April, 1993.

BY THE COURT:

/s/ Terence T. Evans
Chief Judge

X

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
Argued March 29, 1994

June 7, 1994

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

UNITED STATES OF AMERICA

Plaintiff-Appellee,

-vs- No: 92-3254

JOAN R. KAREL

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin

No: 92-CR-91

Terence T. Evans, Chief Judge

ORDER

Joan R. Karel was indicted with 13 counts of mail fraud in violation of 18

U.S.C. § 1341. Following a bench trial she was found guilty on all counts charged. The court issued a written order on April 27, 1993, finding Karel guilty on all thirteen counts.

Karel notes that the government had to prove three elements to convict her. First, that she knowingly devised a scheme to defraud and obtained money by means of false pretenses and representations. Second, that she used the U.S. mail to carry out the scheme. Third, that she did so knowingly and with intent to defraud. Karel argues that the government's evidence was insufficient to prove the third element, that she acted with intent to defraud.

When reviewing challenges to the sufficiency of evidence,

> [W]e will uphold a conviction if the evidence, when viewed in the light

most favorable to the government, establishes that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. we will not reweigh the evidence or present when Karel signed it this form. The form indicated an amount which was not her true earned income.

Karel submitted disability forms each month from October 1986 until January 1989, receiving a total of $90,000.00. Starting in May of 1988 Northwestern began asking Karel for additional information regarding her pre-disability income. Eight months later, Karel finally submitted an I.R.S. form 1120 for 1985, which showed her salary as $6,500.00 per year. Karel was notified of the discrepancy between the $6,500.00 earned income shown on her I.R.S. form

1120, and the $111,606 shown on her W2 and 1040 forms.

In May of 1989 Karel's attorney sent Northwestern a 1985 form 1040 for Karel showing yearly income of $11,600.00. This too, obviously enough, is not what Karel originally told Northwestern she had earned in 1985. Based on these discrepancies, Northwestern notified Karel that it was rescinding the disability income insurance policy and terminating her claims.

Applying the relevant standard, we ask ourselves whether there is any evidence upon which a rational trier of fact could conclude that Karel intended to defraud Northwestern.

The district court mentioned that it relied on several factors in finding against Karel. It noted the testimony of Kathy Rehl, which it found persuasive.

It noted the disability benefits form which Karel signed, which listed income different from her true income. It also noted that Karel contacted Northwestern and asked about the processing of her disability benefits form. It noted that Karel was the sole owner of a business, and might be expected to know how much money she had earned and from what sources. The district court concluded that Karel actively sought benefit payments from Northwestern, that the policy would never have been written for her if she had not misstated her earned income, and that she had control of the documents which contained false statements about her income.

Drawing all reasonable inferences and not reassessing the credibility of witnesses, the district court's

conclusion that Karel intended to defraud Northwestern is amply supported.

AFFIRMED